No. 82-1832

In The

Supreme Court of the United States

October Term, 1984

TOWN OF HALLIE, TOWN OF SEYMOUR, TOWN OF UNION and TOWN OF WASHINGTON,
Petitioners,

vs.

CITY OF EAU CLAIRE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

The questions presented on this appeal are as follows:

Is the City's policy of refusing to provide sewer utility services to properties outside the City, adopted pursuant to state law specifically authorizing but not compelling such activity, immune from application of the antitrust laws under *Parker v. Brown*?

1. Is the policy of the City undertaken in furtherance and implementation of a clearly articulated and affirmatively expressed state policy?

2. Is active state supervision of traditional, integral municipal conduct required?

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STATEMENT OF THE CASE

The Towns of Hallie, Seymour, Union and Washington abut the City of Eau Claire. They filed a complaint against the City alleging violations of the Sherman Act, a duty to serve the Towns under the Federal Water Pollution Control Act and a pendent state claim alleging a common law duty to serve as a public utility.[1]

The City owns and operates a sewage treatment plant. It is the only entity in the immediate area including the Towns which operates a treatment plant. The plant was constructed with federal, city and state funds. Pursuant to state law, the City has determined to fix the limits of its sewer services. It thus refuses to provide any sewage collection, transportation or treatment services to the Towns. Instead, the City will provide sewer services to Town residents only if they agree upon the annexation of their properties to the City. Upon annexation, these residents are eligible to receive sewer services provided by the City. The Towns allege that they are prevented from rendering any sewer services to these residents. No conspiracy, contract or combination in restraint of trade was alleged. The Towns claimed that the City possessed an illegal monopoly under Section 2 of the Sherman Act (15 USC s. 2).

The City moved to dismiss the complaint under Rule 12 (b)(6), Fed. R. Civ. Pro., for a failure to state a claim upon which relief can be granted, claiming immunity under *Parker v. Brown,* 317 U.S. 341 (1943). This motion was granted by the District Court. (J.A. 23).

The Seventh Circuit Court of Appeals affirmed the District Court, concluding that the City's conduct was

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[1]The claims based on the Federal Water Pollution Control Act are not a part of this appeal (P. Brief 5); nor is the pendent claim pursued here.

exempt under *Parker* and *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 102 S.Ct. 835 (1982). The court found that the City acted pursuant to a clearly articulated and affirmatively expressed state policy, applying *Parker*, *City of Boulder*, and *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). The court rejected the claim of the Towns that state law must make specific reference to the use of monopoly power by the City and that the monopolistic conduct must be directed or compelled by the state. The court found that legislative contemplation and authorization of the municipal action must exist before the City may claim immunity under *Parker*. It set forth criteria to be utilized in determining the existence of legislative contemplation.

Under the court's criteria, if state law gives the City authority to limit its sewer services, and to refuse to provide sewage treatment services to the Towns, then the inference can be drawn that the state contemplated that anticompetitive effects might result from such refusal. According to the Seventh Circuit, state policy to displace the antitrust laws will be found if the anticompetitive effect is legislatively contemplated; specifically, if it is a reasonable or foreseeable consequence of engaging in the authorized activity.

The Court of Appeals, while recognizing that "active state supervision" is required for private entities[2], found such a requirement inapplicable to the City while performing a traditional municipal function. *Parker* immunity was therefore granted without a finding of "active state supervision".

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[2]*California Retail Liquor Dealers Assn. v. Midcal Aluminum*, 445 U.S. 97 (1980).

SUMMARY OF ARGUMENT

I. The Motion to Dismiss of the City was granted and upheld by the lower courts. The courts held that the City was entitled to immunity under *Parker v Brown*. The lower courts made no finding that the City violated Section 2 of the Sherman Act. Therefore, no issue is raised on this appeal as to the illegality of the City's conduct under the federal antitrust laws.

II. Legislative contemplation of the challenged activity can be determined from the authorization given to the City to operate in a particular area. Legislative contemplation can be ascertained if the anticompetitive result is a reasonable or foreseeable result of the delegated authority. Detailed approval by the state of specific anticompetitive results is not required for immunity. The Towns' Sherman Act claims are based upon the City's determination to limit its sewer service so as to exclude them. Wisconsin state law concedely grants discretionary authority to the City to so limit its service. Municipal discretion does not defeat *Parker* immunity if sufficient authority has been conferred to the municipality to act in an anticompetitive manner. When the state has authorized the conduct in question, the state is no longer neutral. This case is thus unlike *City of Boulder*, where the state had not conferred authority to the city in the area in question.

III. If state authorization of anticompetitve activity is insufficient for immunity, the alternative is to have state compulsion. This is contrary to *City of Lafayette* and *City of Boulder*. It is also inappropriate, especially in areas involving traditional governmental functions such as the rendering of sewer service. Similarly, when performing such functions, municipalities are greatly different than private entities and should not be held to the same standards. A "necessarily follows" test has not

been adopted by this court or any courts of appeal. Such a standard should not be accepted because it is ambiguous and would force state compulsion of municipal activity, thus intruding on the sovereign state.

IV. This case is vastly different from all the other cases applying the *Parker* doctrine because no private party is affected. The dispute is solely between political subdivisions of the state. *Parker* is based upon principles of federalism and the necessity for preserving state sovereignty. The state has plenary power over its subordinate governments. The federal antitrust laws, designed to protect free enterprise and economic freedom, should not be allowed to interfere with the state's sovereign right to allocate power between its own local governments. The federal government would then be making a legislative judgment as to the "best way" to assign local powers and responsibilities.

V. Wisconsin law sanctions the limitation of utility services which is under challenge. State statutes permit a city to fix the limits of its service area and to insist upon annexation as a precondition of extending service. The state Supreme Court has said that city possession of a monopoly over sewer service is appropriate and that the legislature intended such a result. The state authority is clear and affirmative and not "neutral". Requiring the legislature to go further and mandate monopolization would drastically interfere with state delegation to its municipalities, and would impair the sovereign power of the state.

VI. Adoption of the theories of the Towns would be extremely damaging to the independent decision-making abilities of municipalities. The spectre of exposing basic municipal activities to antitrust scrutiny, not to mention the possibility of ultimate liability, accompanied by treble

damages, would have a chilling effect on municipal actions. Municipalities would be deterred in performing their essential local functions.

VII. The requirement of active state supervision over traditional municipal functions is unnecessary and unwise. It is unnecessary because the conduct is that of a public entity, subject to the inherent limitations imposed upon government. As such, the public entity differs from profit-making businesses operating in competitive markets. The requirement that a city must act pursuant to a clearly articulated and affirmatively expressed state policy should be sufficient for immunity. Active state supervision is unwise for three reasons: 1) federal courts would be burdened with the difficult decision of determining what amounts to "active" supervision; 2) states would be required to invest their valuable resources in the job of supervision, which they may not even desire; and 3) local autonomy and authority would be severely eroded.

Since the Seventh Circuit found it to be unnecessary, whether or not active state supervision exists is not an issue on this appeal.

ARGUMENT

I.

The Issue On Appeal Is Immunity From The Federal Antitrust Laws Under Parker v. Brown, Not Whether The City Is Liable Under Those Laws.

Although the Motion to Dismiss of the City contained several grounds, the only issue considered by the Court of Appeals was the matter of state action immunity under *Parker v. Brown*, 317 U.S. 341 (1943). The issue here is

immunity, not whether the City has in fac violated the Sherman Act. Therefore, the allegations of the Towns at this preliminary stage that the City's actions violate the Sherman Act are premature and unsubstantiated. While properly pleaded facts alleged in the complaint are to be taken as true in disposing of a Motion to Dismiss under Rule 12(b)(6), this does not mean that the allegations are correct. Further, the contention that the "illegality of such conduct is unchallenged by the City" stems from the fact that the City has yet to respond on the merits, not because of concurrence with the statement. The City does indeed challenge any allegation of illegality.

Specifically, the City disagrees with the characterization that the City forecloses competition by selling its treatment services "in the Towns, but not to the Towns". (P. Brief 10-11). The City confines the rendering of its sewer services to the city boundaries, either to present city residents or to former town residents whose property has been annexed to the City. The City at no time sells its treatment services in the Towns, as alleged, a fact which is recognized in the Towns' complaint. (Complaint, par. 14, J. A. 5).

To fully answer questions of illegality, numerous legal and factual issues must first be addressed. These questions would include whether or not the division of sewer utility services into three components is valid or whether it is fictitious and illusory, the effect of the City's activities on interstate commerce, and whether the rule of reason can or should apply. Appropriately, neither the District Court nor the Court of Appeals made any finding as to whether the complaint stated a cause of action on the matter of violation of the antitrust laws. Any such finding is reserved, in the first instance, for the determination of the District Court. See *City of Boulder* (concurring opinion). 102 S.Ct. at 845.

II.

A "Clear Articulation And Affirmative Expression Of State Policy" To Replace Competition With Monopoly Public Service May Be Shown Through Legislative Contemplation And Intent.

The District Court and Court of Appeals found that the City was entitled to immunity from antitrust liability under the "state action" exemption first enunciated under *Parker v. Brown*.[3] In *Parker*, the Supreme Court held that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 350. The Court, applying principles of federalism, held:

> "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351.

The Sherman Act was viewed as a "prohibition of individual and not state action". 317 U.S. at 352. The *Parker* exemption is predicated upon the need to protect State sovereignty. In order for exemption a state policy must exist to displace competition with regulation or monopoly public service. *City of Lafayette*. For immunity to attach, the anticompetitive conduct must be either that of the state itself, or, in the case of a political subdivision of the state, the conduct must be pursuant to a "clearly articulated and affirmatively expressed state policy to replace competition with regulation". *City of Lafayette; City of Boulder*.

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[3]While "exemption" is the common terminology, what is really meant is that the Sherman Act was not intended to apply to the state action exercised in *Parker*. See *City of Lafayette*, 435 U.S. 393 fn. 8.

The dispute here lies not with the foregoing precepts, but with the degree of specificity required to determine state policy. The argument is made that state authorization must affirmatively and specifically approve the anticompetitive effects resulting from the use of delegated power. The Seventh Circuit concluded that state authorization need not be this definitive, and that legislative contemplation of the activity was sufficient. (J. A. 34). See *City of Lafayette*, 435 U.S. at 415.

Federal and state governments exercise sovereignty when legislating within their respective spheres. The *Parker* court found "no suggestion of a purpose to restrain state action in the Act's legislative history". While implicit exceptions to the Sherman Act may not be favored, where the state has clearly, affirmatively and articulately acted, exemption follows. The question here is if state action has in fact been exercised to the required degree.

A. The Test Applied by the Court of Appeals Conforms to the Standards Enunciated in Parker, City of Lafayette and City of Boulder; Specific, Detailed Legislative Authorization Is Not Required for Parker Immunity.

The Court of Appeals, in applying *Parker, City of Lafayette* and *City of Boulder*, refused to adopt a requirement that the City point to a state policy authorizing the City's use of monopoly power over sewage treatment to gain monopolies in sewage collection and transportation. (J. A. 33-34). Instead, the Court of Appeals found that adequate state authorization consisted of the following:

> "In this case, if we can determine that the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services, then we can assume that the state contemplated that anticompetitive effects might result from conduct pursuant to that authorization. (J. A. 34).
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> If the state authorizes certain conduct, we can infer that it condones the anticompetitive effect that is a reasonable or foreseeable consequence of engaging in the authorized activity." (J. A. 34-35).
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> "We hold that any municipality acting pursuant to clearly articulated and affirmatively expressed state policy which evidences an intent of the legislature to displace competition with regulation—whether compelled, directed, authorized, or in the form of prohibition—is entitled to antitrust immunity because conduct pursuant to such a policy would constitute state action." (J. A. 35-36).

The standards applied by the Seventh Circuit follow and are entirely consistent with the precedents established by this Court. *City of Lafayette* rejected the notion that it is necessary to refer to a "specific, detailed legislative authorization" before asserting a *Parker* defense. 435 U.S. at 415. An adequate state mandate exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of". *City of Lafayette*, 435 U.S. at 415.

The Seventh Circuit's test, rather than approval of state "indifference", requires that the state must be found to have affirmatively authorized the questioned activity. Instead of the "antithesis" of prior immunity standards set forth by the Supreme Court, the Seventh Circuit's criterion is consistent with *Parker* in that it upholds and gives effect to sovereign state enactments which would otherwise be nullified by the antitrust laws.

Rather than establishing a new test, the Seventh Circuit faithfully applied the principles and criteria enun-

ciated in *Parker, City of Lafayette* and *City of Boulder*. The City does not disagree with the contention that the goal under *Parker* is to isolate anticompetitive activity which is "attributable" to the sovereign state. (P. Brief 13-14). Activity which is undertaken by the state itself or which is directed by the state is certainly "attributable" to the state, but so is an activity which is contemplated and intended by the state. The Seventh Circuit's standard fulfills such a requirement.

Undeniably, the state may delegate its sovereign authority to its municipalities permitting them to engage in activities having anticompetitive effects which, if undertaken by a private party, would be violative of the Sherman Act. *City of Lafayette* held that a state may "authorize its municipalities to act in a way which, if it did not reflect state policy, would be inconsistent with the antitrust laws". 435 U.S. at 417. This delegation must be "clearly articulated and affirmatively expressed". 435 U.S. 410. The standard of the Seventh Circuit is nonetheless challenged as not fulfilling this requirement. It allegedly permits the granting of a *Parker* exemption where the state's sovereignty would not be impaired by imposing antitrust restraints.

The Seventh Circuit's test, of course, is derived from the explicit language in *City of Lafayette*. If the legislature can be said to have "contemplated the kind of action complained of", then to subject that action to antitrust liability surely impairs the sovereignty of the state. In this case, if the Wisconsin legislature is found to have contemplated that cities may refuse to extend their sewage services extraterritorially, then imposition of antitrust sanction on this conduct impairs the power of the state. Not only is the anticompetitive activity affected, but the

legislative enactment upon which the activity is based is negated.

In the instant case, Wis. Stat. 66.069 (2)(c) authorizes the city to limit its utility service area, a fact conceded by the Towns (P. Brief 32 fn. 19). If the reasonable or foreseeable anticompetitive results of such limitation are subject to the Sherman Act, the practical effect is that the City is not entitled to limit its utility service area. The enabling statute which authorizes such limitation is thus rendered a nullity. The theory that mere legislative contemplation of an anticompetitive activity is an inadequate basis for immunity permits interference with state policy, having an immediate and direct impact on the sovereignty of the state. A requirement that state policy be expressed in more mandatory terms of direction or compulsion results in a restraint upon legitimate sovereign state action. Such a restraint is contrary to the principles of federalism forming the foundation of the *Parker* immunity doctrine.

B. The Test of the Seventh Circuit Does Not Allow State Neutrality to Immunize Local Anticompetitive Conduct.

The Towns claim that the policy of the State of Wisconsin is neutral and the Seventh Circuit's test embodies the concept of neutrality. (P. Brief 22). In *City of Boulder*, a general grant of home rule authority was found to be insufficient to confer immunity, since it was "one of mere neutrality". 102 S.Ct. at 843. The Colorado home rule constitutional provision made no mention whatever of even the general area of concern, cable television, much less the specific activity under review, the granting of a cable television construction moratorium. There was an

"absence of any regulation whatever by the State of Colorado" and therefore "no interaction of state and local regulation". 102 S.Ct. at 843. The State of Colorado had delegated no regulatory authority or expressed a policy or position, one way or the other, as to the questioned activity. The state law was simply silent on the matter. The City submits that *City of Boulder* would have presented an entirely different question, however, had the Colorado legislature enacted legislation authorizing its municipalities to impose moratoriums on cable television construction. In such a case the anticompetitive result would have been contemplated by the legislature. Antitrust immunity would have followed under *City of Lafayette*.

The test set forth by the Seventh Circuit is consistent with *City of Boulder* and the other precedents established by this Court. Under the test, neutrality is insufficient as a basis for immunity. Immunity is not conferred merely because a city "has found a way" to use delegated power anticompetitively. This is because the Seventh Circuit's test specifically requires that the anticompetitive effect be a "reasonable or foreseeable consequence of engaging in the authorized activity". Such a standard is not a new standard at all, but a further clarification of the "legislative contemplation" requirement of *City of Lafayette*. Under the standard, cities would not be permitted to simply do as they please with impunity, but would be able to claim immunity only when it is found that the anticompetitive effect is a reasonable or foreseeable consequence of state action.

Pursuing the claim of neutrality, the Towns make the remarkable statement that:

> "It is just as likely that the legislature delegated the potential authority without considering the possibility that a municipality would impose a restraint of the type engaged in." (P. Brief 22).

It is extremely difficult to see how the foregoing could be true in this case, given the Wisconsin statutory delegation which affirmatively authorizes the limiting of sewer utility services. Nevertheless, if the legislature could truly be said not to have considered the possibility of restraint on competition, then the result of the municipal action would not be a "reasonable or foreseeable consequence" or "contemplated" by the legislature. Immunity would therefore be denied. The test enunciated by the Seventh Circuit would grant immunity only it it is justified pursuant to the exercise of affirmative state action.

The argument is made that the Seventh Circuit's criteria permits exemption where the state authorizes an "anticompetitive use" of delegated power. The Towns claim that a procompetitive exercise of power could be said to be equally condoned, thereby resulting in "precise neutrality". (P. Brief 22). The Seventh Circuit said this:

> "If the state authorizes certain conduct, we can infer that it condones the anticompetitive *effect* that is a reasonable or foreseeable consequence of engaging in the authorized activity." (Emphasis supplied.) (J. A. 34-35).

Thus, the *use* of power must be approved by the legislature, and the anticompetitive *effect* must be a reasonable or foreseeable result of the use of the power. As pointed out in *Vickery Manor Service Corporation v. Village of Mundelein*, 575 F. Supp. 996 (N.D. Ill., 1983) in a case applying *Town of Hallie*:

> "Although in *Town of Hallie* the legislature had not specifically authorized the anticompetitive result which was challenged in that case, the legislature had specifically authorized municipalities to wield the anticompetitive power which caused the result." 575 F. Supp. at 1000.

If the legislature can be said to have envisioned and authorized an anticompetitive result, it certainly must have contemp'ated it, thus satisfying *City of Lafayette*. Since the state can then be said to have contemplated the action, the state's position is not one of "precise neutrality", as alleged. Attempts to invalidate the test of the Seventh Circuit based on *City of Boulder* are in error. The Seventh Circuit requires that the court examine all authority given by the state to the municipality, as shown by statutory and case law, in order to determine whether the state contemplated the anticompetitive effects of the exercise of the authority. This approach is reasonable and appropriate.

The overall objective is to ascertain legislative intention. The goal is not to determine that particular anticompetitive conduct is necessary to implement a state program, but whether the legislature contemplated and intended the action in question. In *City of Boulder*, state neutrality did not meet the foregoing objective, because legislative intent was nonexistent. As a result, enforcement of the federal antitrust laws did not affect any expressed legislative policy of the State of Colorado. The state's sovereignty thus remained unaffected by the application of the antitrust laws to the City's activity.

State condonation of municipal conduct is said to be equivalent to neutrality. The reference to the word "condone" by Judge Wisdom (J. A. 34) must be viewed in the context within which it is used. It is mentioned during a discussion of the meaning of the "legislative contemplation" standard of *City of Lafayette*. In context, "condones" is obviously meant to refer to the intention or contemplation by the state of anticompetitive effects of authorized municipal activity. The criteria set forth by the court comports with *City of Lafayette* and *City of Boulder*. It is not a test permitting antitrust immunization based upon neutral state policy. Because the state must be found to have clearly and affirmatively addressed and to have intended or contemplated the questionable activity, the test does not accept state neutrality as a standard.

The fact that the delegation of State authority may give the municipality a choice of options, some of which may be anticompetitive, does not make the state delegation "neutral". Unless the sole alternative given by the state to its cities is that "you shall act anticompetitively", the cities will possess discretionary authority. If the state decrees "you *may* act anticompetitively", this would undoubtedly be open to challenge according to the argument of the Towns because the City would then retain the ability to not act at all or to act in a procompetitive manner.

This position misses the point made in *City of Lafayette* and *City of Boulder*. The issue is not whether a locality is entitled to refrain from acting or to act procompetitively in exercising its power. Under a system of delegated municipal authority, such alternatives may always be available to the political subdivision, and perhaps even be said to be "contemplated" by the state. In order for a municipality to be immune under *Parker*, the essential question is whether it is empowered, pursuant to clear and affirmative state authority, to act in an anticompetitive manner. Under these circumstances, there is an "interaction of state and local regulation" and the city acts pursuant to state authority, and not solely on its own. *City of Boulder*, 102 S. Ct. at 843.

If the state says that a city may confine its services to the city boundary, why must it be required to go further and state that "the city is authorized to monopolize service in the area"? Such a mandate is not only unnecessary,

but would appear to conflict with the admonition in *Parker* and *Midcal* that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful". 317 U.S. at 351; 445 U.S. at 104. Once the state has clearly and affirmatively conferred the authority to engage in anticompetitive conduct, then it has lent its active assistance to its local agent. The state has expressed its intention to displace competition. As a result, the policy of the state has been declared and the state is no longer neutral. The test applied by the Seventh Circuit accommodates both the Sherman Act and the sovereignty of the state.

C. Public Entities, Especially When Performing Traditional Governmental Functions, Should Not Be Held to the Same Standard as Private Entities.

In one sense, municipalities can be said to be naturally monopolistic, particularly in the area of providing basic, integral and traditional municipal services.[4] Monopolization results because municipalities are seldom required to exercise such powers outside of the city boundaries. Absent legislative authorization, municipalities are not even permitted to perform such functions extraterritorially.[5] Furthermore, merely because a municipality is allowed to extend its services outside of the municipal boundaries does not mean that it is required to do so. In addition to sewer service, the providing of services such as water, police, fire, street, health and refuse disposal are, in the absence of expressed statutory authority, confined to the municipal borders. Within its borders, the determination of the municipality as to how its services will be rendered is plenary, subject, of course, to control and regulation by the state legislature and its agencies.

[4]These are types of service "which governments are created to provide". *National League of Cities v. Usery*, 426 U.S. 833 (1976). The provision of sewer service undoubtedly fits within this category. *Usery*, 426 U.S. at 851. "The drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised." McQuillin, *Municipal Corporations*, ss. 31.10; 31.10a.

[5]See McQuillin, *Municipal Corporations*, s. 10.07; Antieau, *Municipal Corporation Law*, ss. 5.10 and 5.11; Rhyne, *The Law of Local Government Operations*, s. 12.1.

If the decision to confine city sewer services to the city boundary is subject to antitrust scrutiny, then the territorial limitation of all manner of traditional services would be open to antitrust challenge. The denial of other traditional municipal services such as police, fire and garbage services to surrounding areas would be subject to federal antitrust law. There would be no limit as to the number of area communities which could claim an entitlement to any municipal service which they are unable to provide. The city would act at its risk in prohibiting or restricting private entrepreneurs from providing traditional services in competition with those provided by the municipality.[6]

[6]Such results are contrary to state intentions. However, because of the great latitude states historically have granted their municipalities in carrying out traditional operations, state law may confer only general authority in these areas. In this regard, see Wis. Stat. 62.11 (5):

> Powers. Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby

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The performance of traditional municipal services is for the public benefit of the community as a whole, and only the community.[7] Such a situation is plainly distinguishable from the characteristics and motivations of private interests, operating as businesses in competitive markets, whose incentive is profit. Even where a municipality engages in an acknowledged business-like proprietary function, it is different than a private corporation. Generation of revenue is incidental and subsidiary to the governmental purpose furthered by the activity.

> "Local government in this free land does not exist for itself. The fact that local government may enter the domain of private enterprise and operate a project for profit does not put it in the class of private business enterprise . . . Local government exists to provide for the welfare of its people, not for a limited group of stockholders." *New York v. United States*, 326 U.S. 572 at 593 (1946), Justice Douglas, dissenting.

Local governments are readily distinguishable from private bu.. esses in several ways. Local governments

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conferred shall be in addition to all other grants and shall be limited only by express language.

It is ironic that municipalities in those states that have seen fit to entrust to them the greatest amount of autonomy in local affairs are most susceptible to antitrust attack, while municipalities in other states which are granted specifically delegated powers have the greatest degree of immunity.

[7]In this case, the motivation behind the sewer extension policy of the city is to prevent uncontrolled urban sprawl resulting from extraterritorial sewer extensions and to prevent peripheral urban development on the fringe of the city which stifles the city's growth. See *City of Beloit v. Kallas* (infra, p. 33, fn 19). An additional reason is that non-residents of the city who seek city services should equitably not be able to pick and choose the municipal service of their choice, but should instead become a part of the city and support its services through their taxes. See decision of Court of Appeals, quoting *Town of Hallie v. City of Chippewa Falls* (infra, p. 27, fn 11) (J.A. 39-40).

are not profit-making and cannot go out of business. The reason for their existence is to serve the public purpose and to foster and preserve the health, safety and welfare of their citizens. They may expend public funds solely for public purposes. The state legislature has ultimate control over their very existence. Local governments undertake certain functions (police, fire, and sewer), the performance of which is almost universally confined only to government. Practically every governmental decision, whether through performance of a function or by regulation, has an impact on competition, however slight.

Likewise, the impact of the Sherman Act upon public bodies is greatly different than its effect upon private businesses. The antitrust liability of a private corporation is ultimately confined to the assets of the business and is a risk which is assumed and shared by the corporate stockholders. The corporation can eventually cease its business; a city must continue to perform its public responsibilities. On the other hand, exposure to the antitrust laws may hinder and inhibit public officials, who may be concerned about potential liability, from performing their necessary functions in good faith. Further, treble damages and costs of defense which are assessed against public entities are paid not by the business investor but by the public taxpayer.

If a private entity is allowed by the state to decide whether to compete or to act anticompetitively, then there is no conflict between the federal antitrust laws and state law because the entity can comply with both federal and state law at the same time. This rationale does not apply to public entities. If a municipality is required by the Sherman Act to act competitively in an area where the state has indicated it could act anticompetitively, state legislative intent is abrogated by federal law.

For these reasons, those "state action" cases pertaining to private conduct should not be applied wholesale and without question to public defendants. One such case is *Cantor v. Detroit Edison Company,* 428 U.S. 579 (1976). *Cantor* is cited for the proposition that the state's policy must explicitly displace competition; otherwise, no federal-state conflict results. (P. Brief 18-19). The case involved the distribution of electric lightbulbs by a private electric utility. The holding in *Cantor* has been extensively limited to private entities to the point where its applicability to public parties may be in serious doubt. In the words of *Cantor* itself, it was "unlike *Parker*" because no public officials were named as parties and no claim was made that any state action violated the antitrust laws. 428 U.S. at 591.

Bates v. State Bar of Arizona, 433 U.S. 350 (1977), distinguished *Cantor* on several grounds. One was the distinction between public and private defendants. The court suggested that *Cantor* may have been decided otherwise if a public agency or official had been involved.

> "First, and most obviously, *Cantor* would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party." 433 U.S. at 361.

Any contention that the reasoning of *Cantor* automatically applies with equal force to public entities is plainly in error. The plurality opinion in *City of Lafayette* said that *Cantor* was "not necessarily applicable" because it involved private parties. 435 U.S. at 410, fn. 40. The court further noted that "(i)t may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government." 435 U.S. at 417, fn. 48. The majority opinion in *City of Boulder* reiterated this point. 102 S. Ct. at 843, fn. 20.

The concurrence in *City of Boulder* noted that the plurality in *Cantor* "reviewed the *Parker* case in great detail to emphasize the obvious difference between a charge that public officials have violated the Sherman Act and a charge that private parties have done so." 102 S. Ct. at 844; also see fn. 2. *Parker* itself recognized that the purpose of the Sherman Act "was to suppress combinations to restrain competition and attempts to monopolize *by individuals and corporations.* (Emphasis supplied.) 317 U.S. at 351.

A municipality's governmental power to deal with areas customarily reserved for it should not be preempted or displaced by general statutory policies forming an economic model of competition for businesses operating in private markets.

D. The "Necessarily Follows" Test Set Forth By The Towns Is Not The Proper Test For Immunity And Is Contrary To City of Lafayette and City of Boulder.

Having set aside the Seventh Circuit's criteria for immunity, the Towns put forth a test of their own. They suggest that *Parker* immunity should be granted only when the anticompetitive conduct "necessarily follows" from the clear and affirmative declaration of state policy. (P. Brief 27). Such a test is claimed to have application in the Ninth Circuit. However, an examination of the two cases cited for this proposition reveals that only one arguably applied the test, and even that case did not establish a new standard of immunity.

Parks v. Watson, 716 F.2d 646 (9th Cir. 1983), uses the words in concluding that it does not "necessarily follow" that a city having a monopoly over a natural re-

source may tie the purchase of other products or services to the sale of the natural resource. The later case of *Golden State Transit Corp. v. City of Los Angeles,* 726 F.2d 1430 (9th Cir. 1984), also cited as a source of the "necessarily follows" test, makes no reference whatever to it. It refers to *Parks v. Watson,* but only as to the necessity of having a state policy and legislative contemplation of the anticompetitive action. *Golden State Transit,* instead of establishing any new standard, proceeds to apply the well-established criteria of "legislative contemplation". Consequently, instead of a universal standard established by the Ninth Circuit, it appears that the "test" amounts to nothing more than language of interpretation utilized in a phrase in a single case.

The "necessarily follows" criterion has not been enunciated by the Supreme Court. The standard is ambiguous, being capable of two meanings. In one sense, the phrase could merely be a reformulation of the test applied by the Seventh Circuit. If "necessarily follows" is intended to mean "as a natural consequence of", then it is no different than the "reasonable or foreseeable consequence" standard of the Seventh Circuit.[8] An examination of *Parks v. Watson* reveals that this was the meaning intended by the Ninth Circuit in an attempt to determine legislative interpretation. For instance, the court found it "untenable that the legislature contemplated" the restraint on competition. 716 F. 2d at 664. On the other hand, "necessarily follows" may mean that an anticompetitive result must be an "inevitable result" of the authorized activity. Although not clear, this is undoubtedly the

[8]As authority for its "reasonable or foreseeable consequence" standard, the Seventh Circuit cited P. Areeda *Antitrust Law,* setting forth a "necessary consequence" standard. (J. A. 35 fn. 10).

interpretation urged by the Towns. Such a construction would impose the requirement that an anticompetitive action must be directed or compelled by the state. This position has not been adopted by this Court in cases involving the antitrust immunity of municipalities. Any such interpretation was properly rejected by the Seventh Circuit. (J. A. 35-36).

It is clear that in *Parks v. Watson,* the Ninth Circuit did not intend to establish any new test of immunity. The Ninth Circuit stated that because a state may authorize a city to be a sole supplier of a natural resource, it does not "necessarily follow" that the city is immune from antitrust liability when it ties other purchases to the sale of the resource. This statement must be read together with the entire decision, however. The decision, taken as a whole, makes it clear that what the court meant was that there was no legislative contemplation or authorization of the conduct. The court found nothing in the state law which would entitle it to "infer that any authorization" existed for the anticompetitive actions of the city. 716 F. 2d at 664. The court, quoting *City of Lafayette,* stated:

> "Even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization." 716 F.2d at 663.

The "necessarily follows" standard is not the correct test. Of all the federal courts applying the state action exemption to a public defendant since *City of Boulder* and *City of Lafayette, Parks v. Watson* is the only case ostensibly using such a test. No other circuit has applied it. More importantly, the standard of the Seventh Circuit does not admit of a construction which, contrary to *City of Lafayette* and *City of Boulder,* would require state compulsion in order for immunity to attach.

The claim is made that any test other than "necessarily follows" would call for speculation as to whether the legislature contemplated the anticompetitive conduct under scrutiny. Just as the grading of bar exams was found not to be an exact science in *Hoover v. Ronwin* — U.S. —, 52 U.S.L.W. 4535 at 4541 fn. 31 (1984), thus requiring the exercise of judgment and discretion by the bar examiners, neither is the delegation of state authority to municipalities always susceptible to refined scientific analysis. Given the fact that no test will be capable of being applied with mathematical exactitude, the standard espoused by the Towns is no more precise than that of the Seventh Circuit. It is less definite and certain due to its ambiguity. Under any test, state legislative policy and intent must be determined. However, determining whether a particular municipal action was "necessary" would require the federal courts to substitute their judgment for that of the state legislature.

An impairment of state sovereignty by enforcement of the Sherman Act results not only by application of the Act to municipal conduct which "necessarily follows" from the state's policy or program. It is equally true that state sovereignty may be adversely impacted if the antitrust laws defeat municipal action which is legislatively contemplated, authorized and intended. Applying the antitrust laws to legislatively intended and contemplated conduct likewise defeats legislative intent and compromises state sovereignty.

E. No Private Entity is Affected by the City's Conduct; Only Subdivisions of the State Are Involved.

All of the Supreme Court cases applying the state action doctrine to date have involved, to some degree, the relationship of a governmental decision to a private interest affected by that decision.[9] This case is different in that the dispute is entirely between four towns and a city, all subdivisions of the state. Quality of service and consumer welfare are not considerations here. The only possible harm is to the Towns by loss of territory through annexations. Yet this is not an unexpected result since state law permits the annexation of town territory. Wis. Stat. 66.021. Applying Sherman Act principles to this dispute would not increase private competition in the marketplace, but would only serve to reorder the relative powers and authority which the state has previously conferred upon the Towns and the City.

The state is vested with plenary authority and control over its towns and cities. *Town of Mount Pleasant v. Beckwith,* 100 U.S. 514 (1880); *Scharping v. Johnson,* 32 Wis. 2d 383, 145 NW 2d 691 (1966). The state, exercising its sovereignty in this area, is entitled to arrange and rearrange its subdivisions and to allocate and reallocate powers between them as it deems appropriate. An example of this is the Wisconsin legislative scheme governing municipal annexations. State law provides that a city may annex town territory (by direct petition of owners and electors or by petition to court), but a town may not annex city territory. Wis. Stat. 66.021. The state, since it controls all aspects of municipal existence from creation to demise, necessarily possesses the ultimate authority over the degree of competition which will be permitted between its local governments. The Sherman Act goal of "freedom of competition" in the economic arena is

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[9] *Parker* (private raisin products); *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), *Bates* and *Ronwin* (attorneys); *Cantor* and *City of Lafayette* (private electric utilities); *City of Boulder* (cable television companies); *Midcal* (wine dealers); and *New Motor Vehicle Board v. Orrin W. Fox Co.,* 439 U.S. 96 (1978) (automobile dealers).

not as applicable in such a setting, if it should be applicable at all, as it is in the private marketplace. Local governments cannot compete with each other in the same sense as private corporations, nor should the state allow them to engage in unfettered competition. Political subdivisions are allowed to compete with other political subdivisions only to the extent permitted by the state.

Anticompetitive conduct between political subdivisions of a state is far removed from the individual and corporate activities originally intended to be subject to the Sherman Act.[10] The antitrust laws should not be allowed to intefere with the state's hegemony over its own subdivisions. A state should be permitted to exercise its sovereignty over its subordinate governments without disruption in the person of a federal court applying federal antitrust laws.

III.

Wisconsin Statutes And Case Law Clearly Articulate And Affirmatively Express A State Policy To Displace Competition With Monopoly Sewer Service.

The legislature of the State of Wisconsin has promulgated not one but several statutes, each of which clearly articulates and affirmatively expresses state policy in the realm of sewer utility service. Taken together, the statu-

[10]The statement of general principles upon which the Sherman Act is based, as set forth in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), that:

> "Antitrust laws in general, and the Sherman Act in particular are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster,"

seems strangely out of place in such a setting.

tory scheme of the state undeniably supports the city's activity. The allegation that the decision to monopolize service in unincorporated areas was made "without any guidance or direction from the state whatsoever", is patently incorrect. (P. Brief 30). The questioned activity was not undertaken by the city without authorization. Instead it was performed pursuant to explicit state law. The Wisconsin laws amply provide for and demonstrate such guidelines and directives. Contrary to the total absence of any state regulation of cable television in *City of Boulder,* by all accounts Wisconsin law contemplates that municipalities will confine their sewer utility services to the city boundaries. Furthermore, in a case not cited by the Towns, interpreting Wisconsin's "Little Sherman Act" the Wisconsin Supreme Court held that such activity, and any anticompetitive effect of the activity, was in fact intended by the legislature.[11]

A. Wisconsin Statutes 66.076 (1) and 66.30 Are General Grants of Authority and Do Not Negate the Clear Articulation and Affirmative Expression of Other Statutes.

In an argument presented here for the first time, Wis. Stats. 66.076 (1) and 66.30 are cited in support of a contention that state policy is procompetitive and therefore neutralizes other specific statutes authorizing the City's conduct. These statutes fail to support such a proposition.

Section 66.076 (1) is a general enabling statute permitting enumerated municipalities to operate sewage systems.[12] The language of Section 66.076(1) does not

[11]Wis. Stat. 133.01 et. seq.; *Town of Hallie v. City of Chippewa Falls,* 105 Wis. 2d 533, 314 NW 2d 321 (1982).

[12]It is interesting to note that Section 66.076 (1) and (1m) (see text set forth on p. 31 of Towns' Brief), permit *any* mu-

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negative the specific statutory provisions empowering the City to limit extraterritorial sewer service, a matter discussed later in this brief.[13] In fact, Subsection (8) of Section 66.076 itself, pertaining to sewer service, incorporates all of the provisions of Section 66.069, relating to water utilities, including the authorization to limit the sewer service area. See Wis. Stat. 66.076 (8) and Wis. Stat. 66.069 (2) (c).

Section 66.30 is a statute of general application permitting municipalities to cooperate with one another on any matter where they could otherwise act individually. The authority is not confined to sewer utility service, but covers all types of municipal activities. The statute is strictly permissive. Under it, municipalities may or may not choose to enter into cooperative agreements. Simply because a municipality may decide not to cooperate with another does not mean that it is acting anticompetitively. Conversely, two or more municipalities entering into

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nicipality to undertake the collection, transportation *and treatment* of sewage. "Municipality" includes towns. The towns thus possess the explicit authority to engage in all aspects of sewage processing, including treatment. The Towns do not explain their crucial allegation that they can only obtain treatment services from the city. If the inability of the Towns to provide treatment services is for reasons other than the City's policies, such as financial causes, then the Towns are not prevented by the City from competing with the City.

[13]Neither does the City have the degree of autonomy in rendering sewer service which is suggested by the Towns. The City concurs with the Towns that the Public Service Commission of Wisconsin (PSCW) does not have jurisdiction over the extension of sewer service. However, the Wisconsin Department of Natural Resources (DNR) does possess such jurisdiction. See Wis. Stat. 144.024 (2) (r) (DNR may order a municipality to construct an entire sewage system), Wis. Stat. 144.04 (DNR must approve plans for all sewage system extensions), and Wis. Stat. 144.07 (1) (DNR can order the planning and construction of a sewage system so that it may be connected with that of a town and may order such connection).

a cooperative agreement does not guarantee greater competition, but may actually achieve an opposite result. As an example of this, a city and a neighboring municipality could enter into a cooperative agreement to share sewage treatment to the exclusion of adjacent towns.[14] The statute has absolutely no relevance to the issue before the court.

B. Wisconsin Statutes 66.069(2) (c) and 144.07 (1m) Support the Seventh Circuit's Finding of Adequate State Action.

In ascertaining legislative contemplation and authorization, the Seventh Circuit relied upon Wis. Stats. 66.069 (2) (c) and 144.07 (1m).[15] These statutes constitute clearly articulated and affirmatively expressed state policy supporting the conduct of the City.

Section 66.069 (2)(c) plainly states that a city may fix the area within which to extend its sewer services. Once the area is fixed, the utility has "no obligation to serve beyond the area so delineated". By statute, then, the City may limit its sewer service area. The City is therefore authorized to engage in the precise activity which is claimed to be monopolistic and anticompetitive.

Section 144.07 (1m) is an alternative to an order of the DNR compelling the extension of sewer services to a township area. In such a case, the city may offer to annex the area subject to the order. If annexation is re-

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[14]The end result of such an arrangement may be that the Towns would then allege a conspiracy in violation of Section 1 of the Sherman Act instead of Section 2. (15 USC s. 1).

[15]It could also have included, as did the District Court, Wis. Stat. 62.18 (1). This statute grants authority to cities to construct, add to, alter and repair sewerage systems. The authority includes power to "describe with reasonable particularity the district to be served". All of the statutes referred to here are contained in the appendix to this brief.

fused, the DNR order becomes void and the city is not required to extend the sewerage system.

Each of these statutes affirmatively delegates authority to the city to take the action which is under challenge here, namely, the refusal to provide sewage treatment service extraterritorially. The District Court observed that the statutes, viewed individually or collectively, are sufficient for immunity and show ample legislative contemplation of the activity in question. (J. A. 18-20). The Seventh Circuit upheld this finding. (J. A. 37-40).

No allegation is made that the legislature did not authorize, contemplate or intend the fixing of the service boundary by the City. Instead, it is claimed that the statute is permissive, and that a city "may" utilize the statute to fix limits of service, or it may not. (P. Brief 32 and 35). In an attempt to bring this case within *City of Boulder,* it is argued that the City may engage in anticompetitive activity while others may not, and that both practices are equally "contemplated" and "comprehended" by the state. Section 66.069 (2)(c), it is claimed, does not "tell the City" how to delineate the area it will serve. (P. Brief 35). This argument overlooks the declaration in *City of Lafayette* and *City of Boulder* that a state need only authorize the providing of services on a monopoly basis. As with the "necessarily follows" test, this argument fallaciously equates municipal choice and discretion with state neutrality. A state which has promulgated a statute such as Section 66.069 (2)(c) is no longer neutral, even though the statute confers discretion to exercise the authority granted. If a state authorizes a city to take action which, if taken, is anticompetitive, the state must have anticipated and contemplated such a result.

> ". . . when the State itself has not directed *or authorized* an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws." (Emphasis supplied). *City of Boulder,* 102 S. Ct. at 843.

Also,

> "*Parker* and its progeny make clear that a State properly may . . . direct or *authorize* its instrumentalities to act in a way which, if it did not reflect state policy, would be inconsistent with the antitrust laws." (Emphasis supplied). *City of Boulder,* 102 S. Ct. at 844.

City of Lafayette found that an adequate state mandate may be determined "from the *authority* given a governmental entity to operate in a particular area". (Emphasis supplied). 435 U.S. at 415.

To require Section 66.069 (2)(c) to be a directive instead of an authorization would render the foregoing references to legislative authorization meaningless. In such a case, a state would no longer be able to delegate authority to local governments to engage in conduct having potential anticompetitive effects without fear of antitrust exposure. Instead of delegation, state mandate would be required. Political subdivisions would become *de facto* state agencies. Mandated authority is the antithesis of delegated authority, which, after all, is the reason for the existence of local governments in the first place.[16]

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[16] "Immunity (under the state action doctrine) for decisions of subordinate agencies or officials cannot depend on an explicit command from the legislature; delegation of governmental powers necessarily includes the discretion to make decisions not compelled by the legislature." P. Areedo, *Antitrust Immunity for "State Action" After Lafayette,* 95 Harv. L. Rev. 435, 445 fn. 49 (1981).

In the context of this appeal, if the state is required to make all the decisions in the area of sewer service extensions, what need is there for delegated authority? Quite clearly, it is then superfluous. However, *City of Boulder* assures us that under its holding a state will be:

> "No less able to allocate governmental power between itself and its political subdivisions." 102 S. Ct. at 843.

Basing immunity upon a non-mandatory statute such as Section 66.069 (2) (c), does not "wholly eviscerate the concepts of 'clear articulation and affirmative expression'",[17] (P. Brief 35). The foregoing comment in *City of Boulder* was in reference to a "general grant of power to enact ordinances", by way of home rule authority. 102 S.Ct. at 843. It was not a reference to a specific grant of power to undertake a particular activity having reasonable or foreseeable anticompetitive results. To the contrary, the requirement of state compulsion would eradicate the traditional relationship which has long been established between the state and its subdivisions.

It is asserted that the purpose of Section 66.069 (2) (c) is not to displace competition. (P. Brief 35-37). Whatever the statutory purpose, the language of the statute is controlling and its effect is clear.[18] The plain

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[17]The cases of *Vickery Manor* (supra); *Campbell v. City of Chicago*, 577 F. Supp. 1166 (N.D. Ill. 1983); *LaSalle National Bank v. County of Lake*, 579 F. Supp. 8 (N.D. Ill. 1984); and *Unity Ventures, et al v. County of Lake*, No. 81-C-2745 (N.D. Ill. 1984) prove that the Seventh Circuit's test does not "eviscerate" clear articulation and affirmative expression. In these cases arising in the Seventh Circuit *Parker* immunity was denied after applying the standards for immunity laid down by the Court of Appeals.

[18]The history of Section 66.069 (2) (c) is nevertheless illuminating. As set forth by the Towns (P. Brief 36 fn 22) this his-

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meaning of the statute is not ambiguous. Thus, speculation as to some unenunciated purpose of legislature is unnecessary.

The other statute relied upon by the Seventh Circuit is Wis. Stat. 144.07 (1m).[19] As noted earlier in this brief,

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tory shows the changes and development of state policy over the years. The state initially obtained total control over sewer extensions with the adoption of Wis. Stat. 196.58 (5). This resulted in determinations of the PSCW that the rendering of utility services extraterritorially to some users within towns could result in a "holding out" of service, requiring extension to other non-city users. *City of Milwaukee v. PSC*, 252 Wis. 358, 31 NW 2d 571 (1948); *City of Milwaukee v. PSC*, 268 Wis. 116, 66 NW 2d 716 (1954). Against this backdrop, Section 66.069 (2) (c) became law. The statute 1) transferred the authority formerly vested in the PSCW to the state's cities, and 2) eliminated the potential claim that a city was "holding out" and compelled to extend service beyond its designated service area. Thus, state policy has been to transfer power over utility extensions from the state itself to its municipalities. Prior to the enactment of Section 66.069 (2) (c), if the state itself (through the PSCW under the authority of Section 196.58 (5)) had made an anticompetitive decision not to approve extraterritorial extensions of municipal utilities, this would clearly be state action and immune from the Sherman Act. The conscious delegation of this authority by the state to its municipalities should not destroy this immunity.

[19]The Towns do not discuss the purpose and history of Section 144.07 (lm) as they did with Section 66.069 (2) (c). These matters are fully discussed in *City of Beloit v. Kallas*, 76 Wis. 2d 61, 250 NW 2d 342 (1977) where the constitutionality of Section 144.07 (lm) was upheld. The court found that the statute was adopted by the legislature to balance two competing matters of statewide concern: 1) pollution control, and 2) urban development or expansion by annexation. These competing interests were present in the earlier case of *In Re City of Fond du Lac v. Miller*, 42 Wis. 2d 323, 166 NW 2d 225 (1969), where the court refused to permit the judiciary to resolve the conflict between the two interests, and invited the legislature to act. The underlying problem, as expressed in *In Re City of Fond du Lac*, later quoted in *City of Beloit*, was as follows:

> All of the major cities and most of the smaller cities and villages in Wisconsin are surrounded by fringe areas with

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Section 144.07 (1) is the sole statutory authority by which the sewer utility of the city can be ordered by the state to be connected with that of an adjacent town, without the consent of the city. (See p. 28, fn. 13). When such an order is issued, Section 144.07 (1m) empowers the City to seek annexation of the town area and, if the annexation is refused, the state order is voided.

Section 144.07 (1m) is declared to be inapplicable here since no state order has been issued which activates the statute. (P. Brief 37-38). This provision, however, must be viewed as part of the comprehensive statutory scheme. The District Court noted that the statute "is a clear manifestation of a state policy that a municipality may condition the provision of sewer services on annexation". (J. A. 20). The Court of Appeals observed that "(t)his statute is evidence of a state policy to require annexation as a condition to receiving municipal services".

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population densities at or near the normal city level. Even though these fringe areas appear to be a part of the city, they are governed, taxed and provided services by the town. No populated fringe area may become part of the city until the majority of the electors and/or property owners in a particular area desire to annex. Cities and villages invariably offer a higher level of services to their citizens as compared to the surrounding town, and almost without exception it follows that costs of municipal services are correspondingly higher. The argument of the cities is that if the surrounding areas can attain the desired city services without becoming a part of the city, the growth of the cities is likely to be forever stifled, and the residents of metropolitan areas will be forever carrying an inequitable percentage of the tax load. 250 NW 2d at 346.

Not long after *In Re City of Fond du Lac*, the legislature, acting at the court's invitation, enacted Section 144.07 (1m). Chapter 89, Laws of 1971.

(J. A. 38). In determining *Parker* immunity, "A district judge's inquiry . . . should be broad enough to include all evidence of legislative intent." *City of Boulder*, 102 S. Ct. at 840, fn. 12. It is difficult to perceive of a clearer articulation or more affirmative expression of state policy and legislative intent. Judging from the nature and terms of statutory authority delegated to the City, it can be safely assumed that the legislature anticipated the use of that authority to preclude extraterritorial utility extensions and to require annexation prior to provision of service. Such a result is a reasonable and foreseeable consequence of the legislative action.

Going even further, the Towns make the astounding claim that even if Section 144.07 (1m) were directly applicable, the statute still is only an expression of state neutrality. (P. Brief 38). The statute presumably "does not contemplate the elimination of a competitor from the marketplace". (P. Brief 38). However, by authorizing the annexation of properties from the town into the city as a prerequisite of rendering service, the statute contemplates precisely such a result. Under Section 144.07 (1m), the city may choose to sell services to former town residents upon their annexation, while at the same time it may opt not to sell to the town itself. Section 144.07 (1m) is emphatically not a neutral enactment.

A final contention is that since the City, and not the state, "decided" to take the action complained of, the City's actions are therefore not pursuant to any "expressed state policy". (P. Brief 38). According to this view, there can be only one final decisionmaker, the state. If this is true, then any "delegation" of power by the state to its municipalities would be meaningless. Yet *Hoover v. Ronwin* (supra) confirms that there are two distinct levels

at which state authority may be exercised. The state can act directly as sovereign, or it may determine to act indirectly, by delegating its authority. Either action can result in antitrust immunity. But the argument is made that because the City is the ultimate decision-maker, no matter what the legislature intended or the degree of legislative contemplation and authorization, there can be no immunity under *Parker*. Such a position has been previously rejected by this court. *City of Lafayette* and *City of Boulder*.

C. Town of Hallie v. City of Chippewa Falls Buttresses the Finding of Adequate State Action.

The brief of the Towns pointedly and inexplicably omits any reference to *Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 314 NW 2d 321 (1982).[20] The case goes unmentioned even though the factual situation is identical to the case at bar, the case involved the application of the state antitrust law, the Petitioner Town of Hallie was the plaintiff in that case, and the decision was significant to both the District Court and the Court of Appeals.

The case arose under the "Little Sherman Act" of Wisconsin. The same circumstances which are present in this case existed there. The Chippewa Falls treatment plant was capable of treating sewage from the town. The town desired to utilize the city's treatment facility. The city refused, insisting upon the annexation of properties prior to service. The Town of Hallie alleged that it was a potential competitor with the city in the provision of

[20]The City of Chippewa Falls is a Wisconsin municipality located approximately 10 miles north of the City of Eau Claire. The Town of Hallie lies between the two cities.

sewage collection services in the area of the town and that the city was tying the provision of treatment service to the acceptance of other city services. These allegations were assumed to be correct by the State Supreme Court in upholding the dismissal of the action. The court held that the city's actions were not subject to the state's antitrust law.[21] It analyzed the same enabling statutes which are involved on this appeal. The court held that the Wisconsin legislature did not intend that a city's limiting of sewer service should be subject to antitrust scrutiny. Citing the home rule authority of Wisconsin cities[22] and Sections 66.069 (2) (c) and 144.07 (1m), the court stated:

[21]The *Parker* exemption was held inapplicable since the acts of a single sovereign entity were involved. The test enunciated by the court in applying the state antitrust laws to anticompetitive actions of municipalities was "whether the legislature intended to allow municipalities to undertake such actions." The decision is not determinative here since questions of immunity and liability under the Sherman Act are a matter of federal, and not state law. However, as previously noted, the case indicates legislative contemplation and intention.

[22]Even though the Seventh Circuit did not rely exclusively or even primarily upon the grant of home rule authority as conferring immunity, the Court viewed it, as judicially interpreted, as evidence of legislative contemplation. (J. A. 38-40). Home rule power alone in *City of Boulder* was inadequate to confer *Parker* immunity. *City of Boulder* is distinguishable from this case for two reasons:

1. The home rule powers conferred by the State of Colorado greatly differ from Wisconsin home rule authority. In Colorado, in matters of local concern, the legislature is forbidden to act. Article XX, Section 6, Colorado Constitution; *City of Boulder*, 102 S. Ct. at 836 fn. 1 and 843. Wisconsin cities have no power which is beyond the legislative control of the state. Article XI, Section 3, Wisconsin Constitution; *Wisconsin's Environmental Decade, Inc. v. City of Madison*, 85 Wis. 2d 518, 271 NW 2d 69 (1978). The Wisconsin home rule statute itself, conferring general powers upon cities in matters of local affairs, is prefaced with the words "(e)xcept as elsewhere in the statutes specifically provided. . . ." Wis. Stat. 62.11 (5); and

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> "Although the statutes do not specifically so provide, it seems that the legislature viewed annexation by the city of a surrounding unincorporated area as a reasonable quid pro quo that a city could require before extending sewer service to the area." 314 NW 2d at 325.

Referring to Section 144.07 (1m), in response to arguments similar to those made on this appeal, the court stated:

> "While the facts of the present case are clearly not covered by this statute because no DNR order is involved, this statute is still helpful in indicating that the legislature seems to view annexation as an appropriate prerequisite to the provision of sewage service outside the limits of a city. This seems reasonable because establishing and maintaining sewage treatment facilities can be a very substantial financial burden upon the city taxpayers and residents. If an area is to have the benefit of such services, it may be appropriate for it to be annexed in order to add to the city's tax base and help pay for the cost of providing such services." 314 NW 2d at 326.

The court concluded:

> The city, in providing sewage services, is performing a governmental rather than a proprietary service. Its primary objective is to help ensure health and sanitation for its residents. This service resembles other governmental services such as police and fire protection which are monopolies for the public good. There is no profit motive involved and a monopoly exercised by the city is more appropriate than competition in the furnishing of such public services, even though, as here, the service can be extended beyond the geographical boundaries of the city. 314 NW 2d at 326.

Thus, a monopoly over sewer service was found to be "more appropriate than competition". The legislature was

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2. Wisconsin home rule power has been judicially construed in *Town of Hallie v. City of Chippewa Falls* to authorize municipal monopolies over sewer service.

deemed to have intended that the city should not be liable under the state antitrust law.[23] It would be illogical to conclude that the legislature contemplated that the municipal activity would be immune from state antitrust liability but subject to federal antitrust liability. Put another way, if federal antitrust liability applies to state-exempt activity, the legislature's intent is subverted.[24] The *Town of Hallie* case provides the ultimate refutation of the claim that state policy is neutral. The decision overwhelmingly shows that any anticompetitive effects of the city's conduct were legislatively authorized, contemplated and intended.

The Wisconsin Statutes and the *Town of Hallie* case construing them provide more than ample support for the Seventh Circuit's finding that there is a clearly articulated and affirmatively expressed state policy to displace competition with monopoly public service.

IV.

Adoption Of The Towns' Theories Would Be Extremely Detrimental To The Independent Decision-making Ability Of Local Governments.

If the foregoing theories of the Towns were adopted, the independent decision-making ability of municipalities would be severely damaged, if not destroyed entirely. Under these theories, if a city takes action on a matter without explicit state command, it acts at its peril. The City

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[23]The state act, of course was the only antitrust law susceptible to construction by the state Supreme Court. The state courts, in construing the state "Little Sherman Act," are to be governed by federal decisions construing federal antitrust law. *City of Madison v. Hyland, Hall & Co.*, 73 Wis. 2d 364, 243 NW 2d 422 (1976).

[24]This is just the opposite of *City of Lafayette* where Louisiana state law expressly subjected municipal instrumentalities to the state and federal antitrust laws. 435 U.S. at 414 fn. 44.

recognizes that the issue before this court is one of antitrust immunity and not liability. In terms of financial exposure and deterrent effect on municipal action, there is slight difference between the two. The mere exposure to antitrust laws, in such cases, accompanied by the time, effort and expense of defense and the potential for ultimate liability, including treble damages, would have a paralyzing effect on the ability of municipalities to provide for their needed local services.

Cases have arisen since *City of Boulder* which portend such a result. In one such case, *Unity Ventures v. County of Lake,* No. 81-C-2745 (N.D. Ill. 1984) a verdict was rendered in the amount of $9.5 million against several governmental defendants. Trebled, the award totaled $28.5 million. The impact of this single judgment on the communities affected was explained in hearings before the House of Representatives Committee on the Judiciary, on H. R. 6207:

"Fred L. Foreman, State Attorney for the County of Lake, testified at the Mar. 29, 1984 hearing and described the impact of a $29 million judgment on a taxpayer in Lake County:

> 'The payment of this judgment would financially cripple one of the wealthiest per capita counties in the United States. If Lake County were to increase its tax rate to the maximum legal rate, it would take the taxpayers 70 years to pay this judgment and still provide necessary services to our citizens. Even if we used all our cash reserves of $14.8 million, payment would require 35 years. If a judgment levy was used, the average homeowner with a home of an assessed valuation of $60,000 would pay $140.60 to satisfy this judgment. Any cutback of the county general fund or corporate fund would directly affect services such as the courts, jails and law enforcement. Historically, over the past several years, Lake County has only increased its overall levy by an average of $443,419 a year. That is 1.1¢ of equalized assessed valuation. Satisfaction of this judgment would require an increase of 10.1¢ of equalized assessed valuation per year for 7 years." Report 98-965, House of Representatives, 98th Congress, 2nd Session, Committee on the Judiciary, p. 10 fn. 14.

The spectre of liability or defense costs of large magnitude, on the one hand, and the "remedy" of an all-encompassing state involvement in local affairs, on the other, would have more than a chilling effect on the ability of local governments to carry out their appointed tasks. It would strike at the very heart of the basic political functions performed by local government.

V.

Active State Supervision Should Not Be Required; The Existence Of State Supervision Is Not An Issue On This Appeal.

A. Active State Supervision of Traditional Municipal Functions Is Unnecessary And Unwise.

The so-called "second prong" of immunity, "active state supervision", was first fully expressed and applied in *Midcal*. *Midcal* involved private price-fixing which was authorized by the state but which the state had left unsupervised. The requirement has not been applied by this court to a municipal government.[25] *City of Boulder*

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[25]The statement that the position of the Seventh Circuit was "without support in existing case law at the time" (P. Brief 39 fn. 23) is misleading in that there was an absence of case law on the point. Neither was the position contrary to then existing case law. Since *City of Boulder,* several Courts of Appeal have not required active state supervision of authorized municipal conduct. *Gold Cross Ambulance & Transfer v. City of Kansas City,* 705 F. 2d 1005 (8th Cir. 1983), appeal pending; *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency,* 715 F. 2d 419 (8th Cir. 1983);

(Continued on following page)

expressly left open the question whether a municipality must show active state supervision over its conduct.[26]

The Seventh Circuit decided that active state supervision was not necessary for immunity in this case. The court noted that *Midcal* involved a private price-setting mechanism which had been created by California state law, but was thereafter free from supervision. The instant case involves a completely different situation, that of a public entity performing a traditional function. In such a case, where the providing of such services on a monopoly basis is clearly articulated and affirmatively expressed state policy, going further to require active state supervision is unnecessary and redundant. The Seventh Circuit held:

> "Supervision is unnecessary because local governments operate pursuant to clearly articulated and affirmatively expressed restraints imposed by the state in its policies and delegation of authority. If the conduct of local government in providing municipal services is authorized by the state and is clearly articulated and affirmatively expressed as state policy, the activity is state action and entitled to immunity

(Continued from previous page)

Scott v. City of Sioux City, 736 F. 2d 1207 (8th Cir. 1984); *City of North Olmstead v. Greater Cleveland Regional Transit Authority*, 722 F. 2d 1284 (6th Cir. 1983); cert. den. — U.S. —, 104 S. Ct. 2387 (1984); *Golden State Transit Corp. v. City of Los Angeles*, 726 F. 2d 1430 (9th Cir. 1984); *Pueblo Aircraft Service, Inc. v. City of Pueblo*, 679 F. 2d 805 (10th Cir. 1982), cert. den. — U.S. —, 103 S. Ct. 762 (1983). See also *Hybud Equipment Corp. v. City of Akron*, No. 83-3306 (6th Cir. August 24, 1984) holding that the nature and extent of state supervision should be "part of the general inquiry into whether the challenged actions are those of the state as sovereign."

[26]Because the first prong of "clear articulation and affirmative expression" was not met, the Court did "not reach the question whether that ordinance must or could satisfy the 'active supervision' test focused upon in *Midcal*." 102 S. Ct. at 841 fn. 14.

> even though state supervision does not exist." (J. A. 41-42).

The reasoning of the Seventh Circuit, of course, applies exclusively to local governments and not to private entities. Under its own terms, the decision of the Seventh Circuit does not apply with equal force to private parties."[27]

A local government is a creature of the state whose very existence is controlled and supervised by the state:

> "A unit of local government is a creature of the legislature. It owes its existence to legislative fiat and its life may be snuffed out by appropriate legislative action." *Scharping v. Johnson*, 32 Wis. 2d 383, 145 NW 2d 691 (1966).

When a municipality performs a traditional, basic, integral governmental function, it is not subject to business-type motivations found in the private sector. Local governments are charged with carrying out their governmental functions for public purposes, namely the health, safety and welfare of their citizens. They are subject to inherent limitations, which are applicable only to public governmental entities, such as the requirement that public funds must be expended for public purposes. *Hopper v. City of Madison*, 79 Wis. 2d 120, 256 NW 2d 139 (1977). No useful need or purpose is served by adding state supervision, defined by federal courts sitting with exclusive federal antitrust jurisdiction, to the list of limitations.

This case is distinguishable from cases such as *Cantor* where the court indicated that compulsion must exist

[27]The inapplicability of "active state supervision" does not even apply to all municipal activity. Contrary to the Towns' contention, the Seventh Circuit decision does not call for "total elimination" of the active supervision test, even for municipalities. The court explicitly reserved the question as to whether non-traditional local governmental functions must be actively supervised, implying that these functions "may warrant" such supervision. (J. A. 43, fn. 18).

as a prerequisite for *Parker* immunity for private parties. If the state compels the conduct, it must also oversee the conduct to assure continued adherence with the terms of the grant of authority. Such an assurance is necessary so that the anticompetitive activity continues to be directly attributable to the state and is not independent private conduct. No such concern exists with regard to a municipality operating under governmental constraints. In such a case "requiring state authorization of local conduct is analogous to requiring active supervision of private conduct; it tests whether local activity is truly state action and therefore entitled to immunity". P. Areeda, *Antitrust Law*, s. 212.a at 47 (Supp. 1982).

In the specific area of providing sewer utility services, Wisconsin cities are "arms of the state" in carrying out a state policy. In *State ex rel Martin v. City of Juneau*, 238 Wis. 564, 300 NW 187 (1941), state agencies ordered the city to install a sewage treatment system. The order was upheld, the court saying:

> "Under our system of constitutional law municipal corporations and quasi-municipal corporations are arms of the state created for the purpose of exercising within their boundaries those powers conferred upon them by the legislature and discharging such duties as the state may prescribe. In no field is the power of the state broader or more general in the protection and promotion of the public health—a matter which concerns not only the state in its corporate capacity but every individual within it." 300 N.W. at 190.

In order to properly carry out the important health function of providing sewer service to its citizens, broad discretion must necessarily be given to the city. An active state supervision requirement conflicts with the ability of the state to confer such discretion.

Where a state sufficiently authorizes local government "it would be clearly pointless to require regularized supervision by some agency, authority or other arm of the state".[28] The state, in the final analysis, always retains the ability to change its policy and authorization granted to its municipalities.

Not only is active state supervision of a traditional function of local government unnecessary, but the Seventh Circuit found it to be unwise. If required, it would be necessary for the federal courts, having exclusive federal antitrust jurisdiction, to make the difficult determination of what constitutes "active" supervision over matters of peculiarly local concern. Given the possibility of an infinite variety of state regulation among the fifty states, the result could be a [illegible]work of antitrust immunity or liability, all involving the same authorized activity.

The states would be required to expend their valuable resources in implementing unnecessary supervisory mechanisms over any local matter which could be found to be anticompetitive.[29] These concerns are actual and immediate and not "theoretical". Even the Towns agree that active supervision "may not be required in all cases".[30] (P. Brief 40).

Requiring active state supervision is blithely claimed "not (to) interfere with local government's traditional exercise of powers" and not to be "an onerous requirement".

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[28]See *Century Federal, Inc. v. City of Palo Alto*, 579 F. Supp. 1553 (N.D. Cal., 1984).

[29]See *Golden State Transit Corp. v. City of Los Angeles*, 726 F. 2d at 1434.

[30]The Towns' agreement depends on the manner of application of the first prong of *Midcal*, however. Nevertheless, the Towns' concession acknowledges that active state supervision is not always required for *Parker* immunity.

(P. Brief 42). Little elaboration is needed to demonstrate that these statements are completely inaccurate. Traditional local activities such as sewer, water, garbage, police and fire services would not only have to be supervised, but "actively" supervised by the state. The state would be placed in a position which it may not even contemplate or desire, that of having to oversee all of the numerous activities undertaken by a myriad of local governments. As an alternative, the state itself would be required to directly undertake such activities. It appears that the states are not receptive to either alternative, since they have chosen to adhere to the traditional state-local relationship based on discretionary power delegated to their municipalities.

In the words of the Seventh Circuit, requiring state supervision would "erode the concept of local autonomy and home rule authority which is expressed in the statutes and constitution of the state of Wisconsin". (J. A. 42). As stated in the dissent in *City of Boulder*:

> "It would seem rather odd to require municipal ordinances to be enforced by the State rather than the city itself". 102 S.Ct. at 851, fn. 6.

Requiring active state supervision of traditional municipal functions would be the death knell of municipal home rule and delegated municipal authority as they exist today. It would destroy the "Dillon Rule" concept that municipalities are granted express powers by the state and possess such other implied powers as are necessary and convenient to the exercise of the powers expressly granted.[31] There are two basic reasons why municipal

[31]See McQuillin, *Municipal Corporations*, s. 10.09; *City of Mequon v. Lake Estates Company*, 52 Wis. 2d 765, 190 NW 2d 912 (1971).

autonomy in local affairs was established and has been maintained. First, the legislature is thus relieved from the burden of having to deal with local affairs, so that it can concentrate on matters of state-wide concern. Second, local affairs require more attention and comprehensive knowledge than the state could reasonably exercise. See McQuillin, *Municipal Corporations*, s. 1.40, pp. 49-51. Requiring continuous state intrusion into such local matters would defeat these important goals.

B. Whether or Not Active State Supervision Actually Exists Is Not Before This Court.

Since the Seventh Circuit found that active state supervision was not required, the court naturally made no finding as to whether the state does in fact supervise the conduct of the City. The City brought several statutes and case law to the attention of the lower courts showing direct state involvement in sewer utility matters. These statutes pertained to the extensive review authority of the DNR over sewer utility construction and extensions and the state review of annexations.[32] Because the Seventh Circuit found active supervision to be unnecessary, the court did not proceed to determine whether this legal authority met this part of the *Midcal* standard. Whether such statutes do or do not amount to "active state supervision" is not an issue here, and is a matter which should first be resolved by the lower courts.

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[32]See fn. 13, p. 28. The District Court found that the statutes constituted "active state supervision". (J. A. 20). The City thus strongly disagrees with the allegation that "it is clear that the state takes no role in the city's actions." (P. Brief 43).

CONCLUSION

The City is entitled to immunity from the Sherman Act under *Parker v. Brown* and its progeny. The City has acted in accordance with the clear and affirmative policies established by the legislature of the State of Wisconsin and interpreted by the Wisconsin Supreme Court. The judgment of the Court of Appeals upholding the Motion to Dismiss should therefore be affirmed.

Respectfully submitted this 14th day of September, 1984.

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APPENDIX OF STATUTES

WIS. STAT. § 62.18 (1)

Cities shall have power to construct systems of sewerage, including a sewage disposal plant and all other appurtenances thereto, to make additions, alterations and repairs to such systems and plants, and when necessary abandon any existing system and build a new system, and to provide for the payment of the same by the city, by sewerage districts or by abutting property owners or by any combination of these methods. Whenever the council shall determine to lay sewers or provide sewerage in any portion of the city it shall so order by resolution which shall describe with reasonable particularity the district to be sewered. . . .

WIS. STAT. § 66.069 (2) (c) (1981)

Notwithstanding s. 196.58 (5), each village or city may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so delineated. Such area may be enlarged by a subsequent ordinance. No such ordinance shall be effective to limit any obligation to serve which may have existed at the time the ordinance was adopted.

WIS. STATS. 66.076 (8)

The governing body of any municipality, and the officials in charge of the management of the sewerage system as well as other officers of the municipality, shall be governed in the discharge of their powers and duties under this section by s. 66.069 or 66.071 (1) (e), which are hereby made a part of this section so far as applicable and not inconsistent herewith. . . .

WIS. STAT. § 144.07 (1981)

The department of natural resources may require the sewerage system, or sewage or refuse disposal plant of any governmental unit including any town, village or city, to be so planned and constructed that it may be connected with that of any other town, village or city, and may, after hearing, upon due notice to the governmental units order the proper connections to be made or a group of governmental units including cities, villages, town sanitary districts or town utility districts may construct and operate a joint sewerage system under this statute without being so required by order of the department of natural resources but following hearing and approval of the department.

WIS. STAT § 144.01 (1m) (1981)

An order by the department for the connection of unincorporated territory to a city or village system or plant under this section shall not become effective for 30 days following issuance. Within 30 days following issuance of the order, the governing body of a city or village subject to an order under this section may commence an annexation proceeding under s. 66.024 to annex the unincorporated territory subject to the order. If the result of the referendum under s. 66.024 (4) is in favor of the annexation, the territory shall be annexed to the city or the village for all purposes, and sewerage service shall be extended to the territory subject to the order. If an application for an annexation referendum is denied under s. 66.024 (2) or the referendum under s. 66.024 (4) is against the annexation, the order shall be void. If an annexation proceeding is not commenced within the 30-day period, the order shall become effective.